

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

APRIL TERM, 1925.

No. 4317.

224

FANNIE S. PERRY, APPELLANT,

vs.

W. K. REEVE AND VICTOR B. RENCH.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

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Court of Appeals of the District of Columbia.

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Court of Appeals of the District of Columbia.

No. 4317.

FANNIE S. PERRY, Appellant,

vs.

W. K. REEVE and VICTOR B. RENCH.

a Supreme Court of the District of Columbia.

Equity. No. 42384.

FANNIE S. PERRY, Plaintiff,

vs.

W. K. REEVES and VICTOR B. RENCH, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed March 26, 1924.

In the Supreme Court of the District of Columbia.

Equity. No. 42384.

FANNIE S. PERRY, Plaintiff,

vs.

W. K. REEVES and VICTOR B. RENCH, Defendants.

The bill of complaint of Fannie S. Perry respectfully represents:

1. The Plaintiff is a citizen of the United States and a resident of the District of Columbia, and brings this suit as owner in fee simple of certain hereinafter named property. The Defendants, W. K.

Reeves, is a Building Contractor and is now engaged in repairing a certain building No. 1534 Sixteenth Street, Northwest, and Victor B. Rench is the owner of said building No. 1534 Sixteenth Street, Northwest. These Defendants and each of them, as Plaintiff believes, are citizens of the United States and residents of the District of Columbia.

2. That on March 24th, 1924 and for about 35 years prior thereto the Plaintiff was and still is the owner of premises No. 1536 Sixteenth Street, Northwest, City of Washington, District of Columbia. The rear yard of said premises adjoins the premises of the Defendant Victor B. Rench at No. 1534 Sixteenth Street and between these two rear yards there was a fence of wood built on a brick and concrete foundation, the brick foundation standing some 3 or 4 feet above the level of the Plaintiff's rear yard. Until a short time ago the

2 level of the yard of No. 1534 Sixteenth Street was some 3 or 4 feet above that of the rear yard of Plaintiff's premises and this wall served not only as a boundary wall between the two premises, but also as a retaining wall for the ground of the rear yard of premises No. 1534 Sixteenth Street. This wall between the rear yards of the premises hereinbefore named, of concrete and brick was about 20 inches in thickness, some 11 inches of which were on the premises of No. 1534 Sixteenth Street, and about 8 or 9 inches on the premises of Plaintiff.

3. On, to wit, March 5th, 1924 the Defendant Victor B. Rench, as owner, and the Defendant W. K. Reeves, as Contractor, filed an application for a permit in the Building Inspector's Office of the District of Columbia for leave to remodel and repair premises No. 1534 Sixteenth Street. Thereafter, in the progress of these alterations and repairs, the said Defendants cut down the rear yard in premises No. 1534 Sixteenth Street. Thereupon, on to wit, March 24th, 1924, some person representing himself to be the agent of the Defendant W. K. Reeves called up Frank S. Perry, the agent and attorney for Fannie S. Perry, and requested permission to remove the wall between the two rear yards of the said premises. The Defendant W. K. Reeves, through his said agent, was advised that if this matter was taken up in writing with the owner, through her attorney, that consideration would be given and if no damages were likely to occur to premises No. 1536 Sixteenth Street permission might be granted. Without waiting for any such permission, and without any further communication with either the owner of said premises, the Plaintiff herein, or with her attorney, the Defendants and each of them have started in and are now engaged in tearing down and removing the entire wall between these two rear yards. The wooden fence

3 which formerly was located on the top of this wall has been taken down and is temporarily erected in rear yard of plaintiff's premises.

4. The aforesaid wall between the rear yards of these premises was built about 25 years ago by and with the consent of your Plaintiff, who was then owner of the property and the owner of the adjoining premises, No. 1534 Sixteenth Street. One-half of the cost of this wall and the wooden fence was at that time paid by your Plaintiff

and to-wit one-half by the then owner of premises No. 1534 Sixteenth Street.

5. Your Plaintiff further shows that premises No. 1536 Sixteenth Street have been rented and are now in possession of a tenant and that great damage and injury has been occasioned to the tenant and to her possession, and great and irreparable damage has been done to Plaintiff's premises.

6. Your Plaintiff further shows to the Court that the Defendants and each of them have proceeded in this matter in the most high-handed and arbitrary manner and have not given, nor afforded her any notice other than as stated above and are now proceeding without authority of law and in violation of your Plaintiff's rights, and that they and each of them have partly torn down this wall so erected on Plaintiff's premises and so paid for by her at the time it was erected. That the said Defendant W. K. Reeves has threatened to make and your Plaintiff believes has actually made application for a permit to the Inspector of Buildings to tear down this said wall between these two rear yards, and threatens to proceed under said permit if one is granted, all in violation of the building regulations of the
4 District and particularly Section 62 thereof, which specifically provides:

"Party Walls—Sec. 62. The fourth section of the Building Regulations, No. 1, approved by President Washington, October 17, 1791, quoted below, is recognized as in force and is published for the information of builders. The Inspector of Buildings has no official duty as to the enforcement of this regulation, as the matter is one of private rights between the parties."

Your Plaintiff shows that immediate and irreparable injury, loss and damage will result to her unless this Court will grant a preliminary injunction and a temporary restraining order to prevent the further destruction of this wall and fence as set out herein. The wall, if torn down, will, as Plaintiff is informed and believes, be replaced by some other structure or wall on premises No. 1534 Sixteenth Street and that she will be deprived of the use of her said wall or that portion thereof now remaining on her said premises.

Wherefore the premises considered, your Petitioner prays:

1. That the defendants, W. K. Reeves and Victor B. Rench, and each of them, their agents and employees be temporarily and permanently enjoined and restrained from tearing down, destroying or in any manner interfering with the fence or the remainder of said wall between the rear yards of premises No. 1536 and 1534 Sixteenth Street, Northwest, Washington, D. C.

2. And that they and each of them be compelled to replace the said wall in its former condition with the fence on the top thereof.

3. And that the defendants and each of them be required to make good all loss, damages and injuries suffered by Plaintiff
5 on account of the aforesaid unlawful actions of said defendants.

4. That a temporary restraining order be granted without further notice to the Defendants, W. K. Reeves and Victor B. Rench, to pre-

vent them, their agents and employees from tearing down, destroying or in any manner interfering with the remainder of said wall and fence, on the ground that immediate and irreparable injury, loss and damage will result to the plaintiff before notice can be served and a hearing had thereon.

5. And for such other and further relief as to the Court may seem just and proper.

FANNIE S. PERRY.

FRANK SPRIGG PERRY,
Attorney for Plaintiff.

WASHINGTON,
District of Columbia:

I, Fannie S. Perry, first being duly sworn, depose and say that I have read the foregoing bill of complaint by me signed and know the contents thereof; the facts therein stated on my own knowledge are true and those stated on information and belief I believe to be true.

FANNIE S. PERRY.

Subscribed and sworn to before me this 26 day of March, 1924.

CHARLES G. HUBBARD, [SEAL.]
Notary Public, D. C.

6 WASHINGTON,
District of Columbia:

I, Fannie S. Perry, first being duly sworn, depose and say that I am the owner in fee-simple of premises No. 1536 16th Street, Northwest, in the city of Washington, D. C., and have been the owner of the said premises for over 35 years. About 25 years ago your deponent and the then owner of premises No. 1534 16th Street, adjoining, built a wall dividing their rear yards and which wall also acted as a retaining wall for the yard of premises No. 1534 16th Street, which was above the grade of deponent's property. This wall was about 20 inches wide and about half was on each premises and the cost of the wall and the wooden fence on the top thereof was paid for by each of the then owners of the two properties, to-wit, half by each. This wall was in perfectly good condition and did not need any repair, and has been in this place as originally erected for the entire time of about 25 years. Recently in the course of some alterations being made to the adjoining premises and without notice to your deponent, except a telephone call on March 24, 1924, and without deponent's consent or permission and contrary to and in violation of your deponent's instruction and without authority of law, W. K. Reeves, a contractor, purporting to represent the present owner of said No. 1534 16th Street, Victor B. Rench, has commenced and is now engaged in tearing down this wall between the two premises and will thereby permanently deprive plaintiff of the use of this wall and the defendants have trespassed and unlawfully entered upon plaintiff's premises and are tearing down this wall so built and paid for by your deponent. The defendants, furthermore, have taken the

7 wooden fence off the top of said wall and have unlawfully placed it in, to-wit, deponent's rear yard and that deponent's premises are now occupied by a tenant and this unlawful and unauthorized intrusion has greatly interfered with their possession of the premises.

Your deponent further shows that the defendants and each of them, are now actually so unlawfully engaged in tearing down this wall and their action will be and remain an immediate and irreparable injury to your deponent and will deprive her of the use of this wall unless this Court will issue a temporary restraining order to prevent the further destruction of this wall and order and command the defendants and each of them to replace said wall in its original condition and make good all damages occasioned thereby.

FANNIE S. PERRY.

Subscribed and sworn to before me this 26th day of March, 1924.

CHARLES G. HUBBARD, [SEAL.]

Notary Public, D. C.

WASHINGTON,

District of Columbia:

I, Frank Sprigg Perry, first being duly sworn, depose and say that I am the attorney for my Mother, Mrs. Fannie S. Perry plaintiff herein. Plaintiff has been owner in fee-simple of premises 1536 16th Street, N. W., of this city for over 35 years and the dividing and retaining wall and fence between the rear of these premises and 1534-16th Street have been in their same position for over 25 years. They were originally erected with the consent of the then owner of
8 premises 1534-16th Street, but my recollection is that plaintiff paid the entire cost, and they now remain and stand about one half of said wall on each premises. Deponent was advised by defendant W. K. Reeves on March 24, 1924, that he expected to remove said wall and that deponent forbade him to do so without the consent of the owner, but that defendant W. K. Reeves maintained and still maintains that he has the right to remove said wall and fence without the permission of the owner on the ground that it is a party fence or wall, and has in fact torn down about half of said wall and the defendant W. K. Reeves has made application to the Inspector of Buildings for permission to proceed further in the demolition and destruction of said wall and the removal of said fence. Your deponent believes that these defendants and each of them intend upon the permission of the Inspector of Buildings to tear down this wall and thereby to do irreparable injury to plaintiff's property. The hearing on the application to the Inspector of Buildings has been set for Thursday, March 27, 1924, at 10 o'clock A. M.

FRANK SPRIGG PERRY.

Subscribed and sworn to before me this 26th day of March, 1924.

CHARLES G. HUBBARD, [SEAL.]

Notary Public, D. C.

Temporary Restraining Order.

Filed March 26, 1924.

* * * * *

Upon consideration of the petition of Fannie S. Perry, sworn to and filed herein, and the affidavits of said Fannie S. Perry and Frank Sprigg Perry, her attorney, and it appearing to the Court
9 from these said papers that the defendants, W. K. Reeves and Victor B. Rench, and each of them, are about to pull down and destroy a wall and fence between the premises of plaintiff of 1536 Sixteenth Street, Northwest, in the City of Washington, District of Columbia, owned by the said plaintiff, and the premises of defendant Victor B. Rench of 1534 Sixteenth Street and that they have in fact partially destroyed said wall and are now threatening to tear down the entire wall and fence; and it further appearing from said papers so filed that about one-half of this wall is on the land of the plaintiff and about one-half on the land of the defendant Victor B. Rench and that this said wall and a fence thereon has been in its present location for about twenty-five years, and that a part, at least, of said wall and fence was paid for by the plaintiff at that time, and that the said plaintiff has not given her consent to this destruction of said wall and the removal of said fence and has expressly forbidden such destruction and removal, and it being alleged that the destruction by the defendants is without authority of law and that if not restrained there will result to the plaintiff immediate and irreparable injury, loss and damage before notice can be served and a hearing had thereon:

It is this 26th day of March, 1924, ordered, adjudged and decreed that the said defendants, W. K. Reeves and Victor B. Rench, and each of them and their agents and employees be and they are hereby enjoined and restrained from further tearing down or destroying or interfering with the wall or fence between the rear yard of premises Nos. 1536 and 1534 Sixteenth Street, Northwest, Washington, District of Columbia, until the further order of this Court:

10 And this said temporary restraining order shall take effect and be operative immediately upon the plaintiff giving bond in the maximum amount of One thousand Dollars as required by the rules of this Court to make good to the defendants, and each of them, all damages suffered or sustained by reason of the wrongful or inequitable suing out of this temporary restraining order and preliminary injunction, when and upon the serving thereof upon the defendants, or either of them:

And this said temporary restraining order shall expire on the 31st day of March 1924, at 10 o'clock A. M., unless further extended by this Court for good cause before the expiration of said time:

And the matter of the issuance of a preliminary injunction as prayed for in said petition and bill of complaint is hereby set down for hearing for Friday, March 28, 1924, at 10 o'clock A. M.

WENDELL P. STAFFORD,
Justice.

Affidavit of Wm. K. Reeve in Opposition to Injunction.

Filed March 28, 1924.

* * * * *

DISTRICT OF COLUMBIA, *To wit:*

I, William K. Reeve, named as defendant in the above cause as W. K. Reeves, being first duly sworn upon oath deposes and says that he is one of the defendants in the above cause and that he is the Building Contractor for Victor B. Rench, the other defendant in the above cause and the owner of the building No. 1534 16th Street, Northwest as set out in the bill of complaint. That on to wit —,

11 —, there was issued to the defendant Rench, as owner, and the defendant Reeve, as Contractor, the permit from the Building Inspector's Office of the District of Columbia, to remodel, repair and otherwise improve the said premises No. 1534 16th Street, Northwest, in accordance with plans filed with said Building Inspector and which were duly approved by him; that subsequently on to wit, — —, 1924, a further application was made to said Building Inspector for a change from the original plans filed as above and that a new set of plans showing said change was duly filed with said Building Inspector and a permit to proceed with the remodeling and repair of said premises in accordance therewith, was granted by said Building Inspector; that said original plans and said amended plans provided for the location of a garage in the rear of the cellar or basement of said premises, and in order to have access to and from said garage it was necessary to excavate the rear yard of the said premises from the grade level of the alley in the rear of the same to the floor level of said garage.

Deponent admits the location of said division wall and fence between the rear yards of the premises belonging to plaintiff and defendant Rench and that it was absolutely necessary in the making of the improvements to the premises of the defendant Rench to remove said fence and wall and defendant admits that the fence was removed and at the request of the plaintiff's tenant in premises No. 1536 16th Street, Northwest, which is the property of the plaintiff, that this deponent had the fence temporarily erected a foot or two from the dividing line between the yards of said premises and on the yard of the premises No. 1536 16th Street, Northwest. Deponent admits in the prosecution of said work at 1534 16th Street,

12 Northwest, he began the removal of the division wall in question until stopped by the service upon him of the temporary restraining order issued in this cause.

Deponent says that in the completion of the plans for the repair and improvement of said premises No. 1534 16th Street, it is provided that there shall and will be erected, on the division line of the premises of the plaintiff and the defendant Rench a concrete retaining wall in accordance with the Building Regulations, and that a suitable

wooden fence in accordance with said Building Regulations shall and will be erected between the said premises, all at the cost and expense of the defendant Rench, and without any cost and expense to the plaintiff, and that any filling and grading of the yard of plaintiff's premises made necessary by said work will be done by defendant Rench at his own cost and without cost and expense to the plaintiff, so that the premises of the plaintiff will be in as good, or better, condition than they were at the time said work was commenced.

Deponent says that in the prosecution of said work he has, acting as agent for the said defendant Rench, proceeded lawfully and in accordance with the Building Regulations of the District of Columbia, and law, and that no right of the plaintiff in and about her said premises has been usurped or violated.

Deponent therefore says that plaintiff is not entitled to an injunction to stop the removal of said wall and submits that the restraining order heretofore granted should be dissolved, the injunction prayed for refused and the bill of complaint dismissed.

W. K. REEVE.

13 Subscribed and sworn to before me this 27th day of March,
1924.

[SEAL.]

WILLIAM R. NAGEL,
Notary Public, D. C.

Affidavit of Victor B. Rench in Opposition to Injunction.

Filed March 28, 1924.

* * * * * *

DISTRICT OF COLUMBIA, *To wit:*

I, Victor B. Rench, one of the defendants in the above entitled cause, being first duly sworn upon oath depose and say, that I am the owner of premises No. 1534 Sixteenth Street, Northwest, as set out in the Bill of Complaint; that on, to wit: — —, 1924, I employed William K. Reeve who is named as the defendant in the above cause as W. K. Reeves, a building contractor, to remodel, repair, and otherwise improve the said premises No. 1534 Sixteenth Street, in accordance with plans prepared by said Reeve; that said plans were filed with said Building Inspector and application made to him for a permit to make said repairs and to do said remodeling and that on, to wit: — —, 1924, said permit was issued by said Building Inspector; that subsequently, to wit: — —, 1924 amended plans were filed with said Building Inspector making certain changes in said original plans for said remodeling and improving of said premises and said amended plans were approved and permission granted by said Building Inspector to proceed with said work; that said amended plans provided for the erection of a garage in the rear of the cellar or basement of said premises and in order to have access to and from

14 said garage, it was necessary to excavate the rear yard of said premises from the grade level of the alley in the rear of the same to the floor level of said garage which made the premises of deponent lower than the premises of plaintiff.

Deponent admits the location of said division wall and fence between the rear yards of their premises, as alleged in the bill of Complaint, and says that it was absolutely necessary in the making of the improvements to his said premises to remove the said fence and wall and deponent admits that the fence was removed and says that at the request of the plaintiff's tenant in premises No. 1536 Sixteenth Street that said Reeve, acting for deponent, had the fence temporarily erected a foot or two from the dividing line between the yards of said premises and on the yard of premises No. 1536 Sixteenth Street, Northwest. Deponent admits that in the prosecution of said work at his said premises that said Reeve, acting as his agent as aforesaid, began the removal of the division wall in question until stopped by the service upon him of the temporary restraining order issued in this cause.

Deponent says that the plans for the repair and improvement of his said premises provided that there shall be erected on the division wall between the premises of plaintiff and this deponent, a concrete retaining wall in accordance with the building regulations of the District of Columbia and that a suitable fence in accordance with said building regulations will be erected between the premises of the plaintiff and this deponent, and this deponent states that he will pay the cost and expense of said wall and said fence and that the same will be erected without any cost or expense to the plaintiff. Deponent further says that if there is any filling and
15 grading of the yard of plaintiff's premises made necessary by said work that he will have the same done at his own cost and expense and without cost and expense to the plaintiff, so that the premises of the plaintiff at the completion of said work will be in as good or better condition than they were at the time said work was commenced.

Deponent says that in the prosecution of the improvements to his property as aforesaid he and his agent, the said Reeve, have proceeded lawfully and in accordance with the Building Regulations of the District of Columbia, and law, and that no right of the plaintiff in and about her said premises has been usurped or violated.

Deponent therefore says that the plaintiff is not entitled to an injunction to stop the removal of said wall and submits that the restraining order heretofore granted should be dissolved, the injunction prayed for refused and the bill of complaint dismissed.

VICTOR B. RENCH.

G. R. LINKINS,
Attorney for Defendants.

Subscribed and sworn to before me this 28th day of March, 1924.
[SEAL.]

HARRY S. WELCH, JR.,
Notary Public, D. C.

Order Vacating Restraining Order and Denying Temporary Injunction.

Filed March 28, 1924.

* * * * *

Upon consideration of the bill of complaint and the affidavits filed therewith and of the affidavits of defendants filed in opposition to the granting of an injunction pending the final determination of the cause, and after argument it is this 28th day of March,

Adjudged, ordered and decreed, that the temporary restraining order passed herein on March — 1924 be and the same is hereby vacated and dissolved, and that the temporary injunction prayed is hereby denied.

By the Court:

WENDELL P. STAFFORD,
Justice.

Motion to Dismiss Bill.

Filed April 2, 1924.

* * * * *

Now come the defendants by their attorney, *George R. Linkins*, and move the Court to dismiss the Bill of Complaint for the following reasons in point of law:

One. That said Bill of Complaint fails to state a cause of action entitling the plaintiff to any relief in a Court of Equity.

Two. That the Bill of Complaint fails to state a cause of action giving this Court any jurisdiction over its subject matter.

Three. And for other and further reasons in point of law, errors, insufficiencies and defects apparent upon the face of said Bill of Complaint.

G. R. LINKINS,
Attorney for Defendants.

To Frank Sprigg Perry, Esquire:

Please take notice that the above motion to dismiss the Bill of Complaint in the above cause has been set down for hearing before Mr. Justice Stafford, or other Justice, holding Equity Court No. 2, on Friday, April 11, 1924, at ten o'clock A. M., or as soon thereafter as counsel can be heard.

G. R. LINKINS,
Attorney for Defendants.

Amendment to Bill.

Filed April 25, 1924.

* * * * *

Leave of Court being first had and obtained, the Plaintiff herewith files an amendment to the original Bill of Complaint:

Insert on Page 4 the following paragraphs:

7. The Plaintiff shows that since the filing of the original Bill herein the Defendant Victor B. Rench, as owner, and the Defendant W. K. Reeve, as Contractor, have torn down the brick and concrete fence and retaining wall between the rear yards of the two said premises and has erected in place thereof a concrete retaining wall of about 18 inches in thickness, of which about 9 inches is on each premises. The Plaintiff further alleges that the tearing down of this wall as alleged in the original Bill of Complaint and the erection of this said concrete wall on her premises is without authority and in violation of the law of this District, and that the continued occupancy by this said wall of the portion of Plaintiff's rear yard is without authority of law.

8. The Plaintiff further shows that in the erection of this said new concrete retaining wall and in building the garage adjoining, the Defendants, and each of them, have made use of the rear side wall of Plaintiff's house for about 20 feet, which was and is a party wall and was erected wholly by the expenditure of Plaintiff's money, and for the use of which Plaintiff should receive due compensation from the Defendants and each of them.

And by adding the following prayer at the end of Plaintiff's Bill on Page 4:

6. And that the Defendants be enjoined and restrained from continuing the occupation of Plaintiff's land and premises by said fence and wall and be required to remove said fence and wall from the premises of Plaintiff.

FANNIE S. PERRY,
By FRANK SPRIGG PERRY,
Attorney.

FRANK SPRIGG PERRY,
Attorney for Plaintiff.

CITY OF WASHINGTON,
District of Columbia, ss:

I, Frank S. Perry, first being duly sworn, depose and say that I am the Agent and Attorney for the Plaintiff herein, Fannie S. Perry, and that I have read the foregoing amendment to the Bill of Complaint subscribed by me for the Plaintiff and know the contents thereof; the facts therein stated of my own knowledge are true and those stated on information and belief I believe to be true.

FRANK SPRIGG PERRY.

Subscribed and sworn to before me this 25 day of April, 1924.
MORGAN H. BEACH,
Clerk,
By F. S. ROHRER,
Asst. Clerk.

(Endorsed.)

April 25, 1924.

Leave to file granted.

WENDELL P. STAFFORD,
Justice.

19

Order Overruling Motion to Dismiss.

Filed June 2, 1924.

* * * * *

Upon consideration of the motion to dismiss the original bill, filed herein and which by consent of counsel for all parties was extended to include the amended bill filed herein, and after argument by counsel, it is ordered and decreed, that the said motion be and the same is hereby overruled, without prejudice to the right of the defendants to reserve and raise the points of law in their answer, which defendants set out as reason for their motion to dismiss.

WENDELL P. STAFFORD,
Justice.

Approved.

G. R. LINKINS,
Att'y. for Defts.

Answer of Defendants.

Filed June 7, 1924.

* * * * *

The joint and several answer of the defendants, W. K. Reeve and Victor B. Rench, to the original bill of complaint and the amendment to the original bill of complaint, filed herein, or to so much thereof as they are advised it is material and necessary for them to make answer, is as follows:

One. These defendants admit the allegations contained in this paragraph.

Two. Defendants have no knowledge as to plaintiff's ownership of premises 1536 Sixteenth Street, Northwest and call for strict proof thereof. They admit that the rear yard of premises 1536 Sixteenth Street, Northwest adjoins the rear of premises 1534 Sixteenth Street owned by defendant Rench and that the fence and brick retaining wall was situated between Nos. 1534 and 1536 Sixteenth Street, Northwest as alleged and that until the improvements made by defendant Rench to his said premises the level

of the rear yard of defendant Rench's premises was between three and four feet above the level of the rear yard of plaintiff's said premises and that the wall referred to was a retaining wall as alleged by plaintiff, but said wall and the wooden fence built thereon were a mere division fence within the meaning of the building regulations of the District of Columbia. Defendants deny that said wall was about twenty inches in thickness, but on the contrary say that it was of an average thickness of about seventeen or eighteen inches and was located about nine inches on the premises of defendant Rench and about eight or nine inches on premises 1536 Sixteenth Street, Northwest.

Three. Defendants admit that they did make application to the Building Inspector of the District of Columbia for a permit to remodel and repair premises 1534 Sixteenth Street, Northwest according to plans filed with application and say that on February 27, 1924 a permit was duly issued by the Building Inspector of the District of Columbia, a copy of which is attached hereto, marked Defendants' Exhibit No. 1, and prayed to be made a part of this answer. Defendants further say that afterwards they made application to the Building Inspector for permission to erect a brick garage in the basement of premises 1534 Sixteenth Street, Northwest, with an inclined driveway from the alley in the rear through the yard of said premises, and that, on March 6, 1924, a permit was duly issued by the Building Inspector of the District of Columbia, a copy of which is attached hereto, marked Defendants' Exhibit No. 2, and prayed

21 to be read as a part of this answer. That in the building of said garage and said driveway, it was necessary to excavate the rear yard of premises 1534 Sixteenth Street, Northwest to a point below the level of said original retaining wall and to erect a new retaining wall in place of the old one which it was so necessary to tear down, as the yard of premises No. 1534 Sixteenth Street, Northwest, when improvements were completed, would be below the grade of the rear yard of premises No. 1536 Sixteenth Street, Northwest. They admit that defendants cut down the rear yard of premises 1534 Sixteenth Street, Northwest and say that this was done in order to permit access by the inclined driveway from the alley in the rear to a garage which defendant Rench was building, under the permit aforesaid, in the basement of his said house, 1534 Sixteenth Street, Northwest. Defendants admit that an agent of defendant Reeve, F. Nelson Reeve, called on the occupant of premises 1536 Sixteenth Street, Northwest and advised her that in the making of the contemplated improvements to premises 1534 Sixteenth Street, Northwest it was necessary to tear down the retaining wall in question and suggested that defendants would move the division fence which was erected on top of said retaining wall a foot or two back on the yard of premises 1536 Sixteenth Street, Northwest so that the yard of said premises 1536 Sixteenth Street, Northwest would be inclosed and protected while the improvements to defendants' said premises were being made. Defendants say that the occupant of premises 1536 Sixteenth Street, Northwest then advised said F. Nelson Reeve that said premises were owned by the plaintiff and in charge of her son, Frank S. Perry,

and said F. Nelson Reeve then and there called said Frank S. Perry on the telephone and advised him that they intended to remove said wall and to move said fence temporarily a foot or two back on the rear yard of premises 1536 Sixteenth Street, Northwest as aforesaid, but defendants specifically deny that they requested of the occupant of said premises 1536 Sixteenth Street, Northwest or of the said Frank S. Perry any permission to remove the said retaining wall and fence, as under the law no permission was necessary except that of the Building Inspector of the District of Columbia whose permission defendants had as aforesaid and at that time they were already engaged in removing said wall and so continued until stopped by the temporary restraining order issued in this cause. When said temporary restraining order was issued defendants had already moved said fence about thirty inches on the yard of premises No. 1536 Sixteenth Street, Northwest and it remained in that position until about May 30, 1924 when it was erected on top of a new retaining wall built by defendant Reeve at the cost and expense of defendant Rench. Defendants further say that when said F. Nelson Reeve talked to said Frank S. Perry on the telephone regarding the removal of said wall and fence that said Perry stated he would come out to the property and look it over. Defendants are informed that said Frank S. Perry did shortly thereafter, and on the same day, come out to the property and after viewing the work that was being done advised one of the men who was engaged in tearing down the wall that the owner or contractor would have to write asking permission for its removal. That this message was communicated to said F. Nelson Reeve and that on the same day and immediately thereafter he went to the Building Inspector's office with Cecil James, who laid the matter before one of the inspectors of said office who advised him that he was within his rights in tearing down the wall; that he needed no permission from the owner of the adjoining property and that they could proceed with their work. Defendants further say that a day or two later Mr. Carr, a field inspector of the Building Inspector's Office of the District of Columbia, came on the premises 1534 Sixteenth Street, Northwest and stated that if it was necessary the Building Inspector's office would order the retaining wall in question torn down.

Four. These defendants have no personal knowledge of the matters alleged in this paragraph and if they are material at all, which these defendants deny, strict proof of the same is demanded.

Five. These defendants say they are not advised as to the conditions of the occupancy of said premises 1536 Sixteenth Street and if it is material at all in this case, defendants call for strict proof thereof. Defendants have no knowledge regarding the renting and possession of No. 1536 Sixteenth Street, Northwest and if it is material, which they deny, strict proof thereof is demanded. Defendants deny the allegations of damage and injury alleged in this paragraph.

Six. Defendants deny that they or either of them have proceeded in the improvement of premises No. 1534 Sixteenth Street in a high handed and arbitrary manner, but on the contrary say that they have

proceeded in a lawful manner under permits from the Building Inspector of the District of Columbia as aforesaid; that they were not required by law or otherwise to give any notice to plaintiff or the occupant in said premises No. 1536 Sixteenth Street, Northwest regarding the construction work which they were doing at premises 1534

24 Sixteenth Street, Northwest, including the removal of said fence and retaining wall. They admit that they tore down the retaining wall above referred to and say that they were within their lawful rights in so doing. These defendants deny that said wall was a party wall in law or under the building regulations of the District of Columbia and deny that Section 62 of the Building Regulations, quoted in this paragraph of plaintiffs' bill of complaint, is applicable to the wall in question. These defendants deny that immediate and irreparable injury, loss and damage will or did result to plaintiff by reason of the taking down of the wall in question or that any loss, cost or damage has been or will be occasioned by any act of defendants in connection with the said improvements to No. 1534 Sixteenth Street, Northwest and on the contrary say said wall was no part of any building or improvement, but was a mere retaining wall made necessary by the difference in the grades of the yards of said premises No. 1534 and 1536 Sixteenth Street, Northwest and that the fence in question was a mere division fence between the premises of plaintiff and the premises of defendant RENCH, which defendant RENCH had a right to remove in making the improvements to his said premises and defendants deny that plaintiff had any rights in said retaining wall and fence that would prevent their removal in order to make the improvements to defendant RENCH's said premises which he was entitled to lawfully do and make under the building permits above referred to and the law.

Seven of Amendment to Bill of Complaint. These defendants admit that after the temporary restraining order was dissolved they completed the tearing down of the retaining wall in question which they had a right to do without any permission from plaintiff or anyone else except the Inspector of Buildings whose permission defendants had as aforesaid and say that they have, at the expense
25 and cost of defendant RENCH erected in place thereof a substantial concrete retaining wall of about twelve inches in thickness, of which about six inches is on each premises, and defendants say that they have, at their own expense and without cost to the plaintiff replaced the fence on said retaining wall between said premises, and that said new retaining wall is a more substantial one and said fence is now a much better fence and in much better condition than the retaining wall and the fence which was originally between said premises. Defendants deny that the erection of said concrete retaining wall half on the premises of plaintiff and half on the premises of defendant RENCH is without authority and in violation of the law in this District, but say that on the contrary they are lawful and were lawfully erected as aforesaid and defendants deny that the continued occupancy by this said wall of the portion of plaintiff's rear yard on which it stands is without authority of law. Defendants say

that said new concrete retaining wall does not occupy as much of plaintiff's premises as the old wall which it replaced.

Eight of Amendment to Bill of Complaint. Defendants admit that they made use of a portion of the rear side wall of plaintiff's house which they aver was a party wall and which they had a right under the law of the District of Columbia to so use, but they deny that they used twenty feet of said wall, but on the contrary say that they used — feet of said wall. Defendants aver that they have had the portion of plaintiff's said party wall measured by the Building Inspector of the District of Columbia and that he has issued a certificate showing the portion of said wall used and the value thereof to be

26 \$62.46. A copy of said certificate of said Building Inspector is filed herewith marked Defendants' Exhibit No. 3 and prayed to be made a part of this answer. Defendants say that on to wit: May 29, 1924 defendants' attorney mailed to plaintiff in care of her attorney of record, Frank S. Perry, Esquire, a duplicate of said certificate of said Building Inspector together with a certified check on the Merchants Bank and Trust Company of Washington, D. C., postage prepaid, for said sum of \$62.46 in payment for the portion of said plaintiff's party wall used as aforesaid, and that the receipt of said letter and check in payment of said party wall as aforesaid were acknowledged by said Frank S. Perry by letter of June 2, 1924, the original of which is filed herewith marked Defendants' Exhibit No. 4 and prayed to be read as a part hereof.

And defendants further say that said bill of complaint fails to state a cause of action entitling plaintiff to any relief in a Court of Equity, because, even if the defendants in the prosecution of the improvements to the said premises 1534 Sixteenth Street, Northwest did any acts which caused the plaintiff to suffer any loss, cost, damage or expense, which defendants specifically deny they have done, plaintiff has an adequate remedy at law, and defendants say that they and each of them are financially responsible and will be able to answer and satisfy a judgment rendered against them for any such damage.

And further answering said bill of complaint, defendants say that it fails to state a cause of action giving this Court any jurisdiction over its subject matter.

27 And these defendants further say that said bill of complaint is defective in point of law on account of other errors, insufficiencies, inconsistencies and defects apparent upon its face.

And having fully answered, these defendants pray that said bill of complaint may be dismissed with their reasonable costs and expenses, in this behalf, most unjustly expended.

W. K. REEVE.
V. B. RENCH.

G. R. LINKINS,
CHAS. LINKINS,
Attys. for Defts.

We do solemnly swear that we have read the foregoing answer by us subscribed and know the contents thereof and that the matters and

things therein stated upon our personal knowledge are true and those stated upon information and belief we believe to be true.

W. K. REEVE.
V. B. RENCH.

Subscribed and sworn to before me this 5th day of June, 1924.

[SEAL.]

FRANK B. TIPTON,
Notary Public, D. C.

Commission expires Oct. 31, 1926.

28

DEFENDANTS' EXHIBIT No. 3.

April 17, 1924.

Mr. W. K. Reeve,
826 19th St. N. W.,
Washington, D. C.

DEAR SIR:

Pursuant to your request, I have measured the south wall of premises 1536 Sixteenth Street, Northwest, and find one-half the contents and value thereof to be as follows:

1,635 bricks @ \$36 per M.....	\$58.86
12 cu. ft. concrete @ .30.....	3.60
Total	<u>\$62.46</u>

The measurement fee of \$5.00 has been paid by you.

Respectfully,

JOHN W. OEHMANN,
Inspector of Buildings, D. C.

DEFENDANTS' EXHIBIT No. 4.

Frank Sprigg Perry,
Attorney and Counsellor at Law,
Woodward Building,
Washington, D. C.

June 2, 1924.

George R. Linkins, Esq.,
1719 K Street N. W.,
Washington, D. C.

MY DEAR MR. LINKINS:

I am in receipt of your letter of May 29, 1924 and the enclosed statement from John W. Oehman, Civil Engineer, Inspector of Buildings, D. C., dated April 17, 1924. This statement sets out that he finds that *one-half* the contents and value of the south side wall of premises 1536 16th Street, N. W. amounted to \$62.46. You will

note that in your letter above referred to there is a statement that you are enclosing a check for this amount covering "the total value
29 of the wall." This apparently was an oversight on your part as the amount set out by Mr. Oehman was one-half of the value of the wall and the check made to Mrs. Perry was properly made in the amount named, \$62.46.

I understood from you on the telephone today that this covered only the south side wall of the building, which is a party wall and which was used as such by Mr. Rench in the construction of his premises. I do not understand that the certificate from the Building Inspector's Office covers in any way the wall between the rear yards between these two premises.

Confirming my telephone message to you, I presented today to Judge Stafford the order in the equity suit and it was signed by him.

Yours very truly,

FRANK SPRIGG PERRY.

FSP—D.

Motion to Strike Out Joint and Several Answers, &c.

Filed June 10, 1924.

* * * * *

1. Now comes the Plaintiff through her attorney and moves that the joint and several answers of the Defendants filed herein be stricken out as not constituting a cause of defense to the several matters and things set forth in the Bill of Complaint as amended, except in so far as relates to Section 8 of said bill, which latter section has been adjusted.

2. And further to strike out so much of Paragraph 3, Page 2, Exhibits 1 and 2 as relate to permits, the copies of the permits themselves not being complete in that they fail to show applications or plans which provide for the tearing down of the original wall between the two yards, nor for the erection of a new wall and fence, and it not being alleged that either of said applications or plans nor the permits given therefor authorize such work.

30 3. And further to strike out so much of Paragraph 3, Pages 3 and 4, as relate to transactions in the Building Inspector's office and conversations with or statement by said inspectors, such allegations being irrelevant, hearsay and not binding or affecting Plaintiff.

4. And further to strike out so much of Paragraph 6, Pages 4 and 5, as relate to conclusions of law as to what Defendants, or either of them, were required to do or not to do by law.

5. And further the Plaintiff requests for a decree pro confesso in accordance with the prayers of the bill as amended (except Section 8) for want of an answer or a sufficient denial of any of the charges and allegations made in said bill.

FRANK SPRIGG PERRY,
Attorney for Plaintiff.

George R. Linkins, Esq.,
Attorney for Defendants:

Please take notice that the above Motion to strike out the Answer of the several Defendants and for a decree Pro Confesso for want of a sufficient answer in the above entitled cause has been set down for hearing for Friday, June 13, 1924, at 10 A. M., or so soon thereafter as counsel can be heard.

FRANK SPRIGG PERRY,
Attorney for Plaintiff.

31 *Order Overruling Motion to Strike Out Answer, &c.*

Filed June 20, 1924.

* * * * *

Upon consideration of the plaintiff's motion to strike out the joint and several answer of the defendants and certain portions thereof and for a decree pro confesso, and after argument by counsel it is this 20th day of June, 1924, ordered, that said motion be and the same is hereby denied and overruled.

By the Court:

WENDELL P. STAFFORD,
Justice.

Stipulation as to Evidence.

Filed November 13, 1924.

* * * * *

The original bill of complaint, the amended bill of complaint, the answer of the defendants under oath and exhibits, and the other proceedings of record in this case are to be admitted in evidence, subject to all proper objections.

For the purpose of the hearing of this case it is agreed that the following facts are proven and are in evidence.

That the premises 1536 Sixteenth Street, Northwest is owned in fee simple by the plaintiff and the premises 1534 Sixteenth Street, Northwest is owned in fee simple by the defendant Victor B. Rench.

That plaintiff's property is occupied by a tenant.

32 That on February 27, 1924 a permit in regular form was issued by the Building Inspector of the District of Columbia to defendant Rench to erect a brick addition at the rear of his said premises, to make repairs thereto as per plans and to build a sleeping porch on the building. That defendant Reeve, a building contractor, was employed by defendant Rench to do said work, and on or about the date of said permit commenced work on the same. That a copy of said permit No. 6680 is attached as an exhibit to defendants' answer.

That thereafter defendant Rench made application to said Building Inspector for a permit to build a separate brick garage in the rear of the yard of his said premises fronting on the public alley in the rear thereof, and a permit to erect same was issued to him, a copy of which permit No. 7143 is attached as an exhibit to defendants' answer.

That thereafter defendant Rench decided not to erect said separate brick garage in the rear of the yard of his premises and made application to said Building Inspector for a permit to construct the said garage in the basement of the house itself and as the basement floor level was about five feet below the level of the alley in the rear of said premises, to connect this basement garage with the alley by a runway.

Plans for this basement garage were filed with the Building Inspector and a copy of said plans is attached hereto, and on March 14, 1922 the permit No. 7143 to erect the separate garage was cancelled and said plans for the garage in the basement of the house were approved and permit granted for the same by the said Building Inspector.

That before said work was started upon the premises of defendant Rench, the house on plaintiff's property extended about
33 eight feet further back than the house on defendant Rench's property and the rear yard of his property was about three feet above the level of the yard of plaintiff's premises and between the two rear yards there was a division fence of wood built on a foundation wall of brick laid in cement mortar and that said wall extended from the rear of plaintiff's said house to the line of the public alley in the rear of both of the premises in question a distance of about 37 feet. That said brick and concrete wall (quoting from the bill of complaint) "served not only as a boundary wall between the two premises but also as a retaining wall for the ground of the rear yard of premises No. 1534 Sixteenth Street" * * * and "was built about twenty-five years ago by and with the consent of plaintiff, who was then owner of the property and the owner of the adjoining premises No. 1534 Sixteenth Street". One-half of the cost of this wall and the wooden fence was at that time paid by plaintiff and one-half by the then owner of premises No. 1534 Sixteenth Street".

That in order to build the runway from the alley to the garage in the basement of his premises it was necessary to excavate the rear yard of defendant Rench's property to a point below the level of the rear yard of plaintiff's premises and below the bottom of the original retaining wall and that on the morning of March 24, 1924 defendant Reeve, through his agent F. Nelson Reeve, communicated to Frank S. Perry, son of and attorney for plaintiff, the necessity of removing said old retaining wall, and did thereafter on the afternoon of the same day commence the excavation of said yard and the removal of said old retaining wall, whereupon plaintiff filed this suit, and Mr. Justice

Stafford issued a temporary restraining order which was answered by both defendants and after a hearing before Mr.
34 Justice Stafford said temporary restraining order was dis-

solved, and defendants proceeded with the excavation of said yard and completed the removal of said retaining wall, and built the said addition to said house of defendant Rench with said basement garage and a concrete runway therefrom to the alley in the rear of the premises. That defendants have erected at the expense of defendant Rench a substantial new cement wall running from the rear of the new addition to defendant Rench's property to the line of the rear alley a distance of about 32 feet six inches and extending up to and a few inches above the level of the rear yard of plaintiff's property in order to prevent the dirt of plaintiff's yard from washing away in the said runway, the said new wall being approximately the same thickness and being located in approximately the same place, (that is half on the land of plaintiff's and half on the land of defendant Rench), as the old retaining wall. That defendant Rench has also at his own expense erected a new division fence on the top of said retaining wall.

That defendant Rench paid to plaintiff the value of the portion of the rear side wall of her said premises which he used in the erection of the said addition to his said house.

That defendant Reeve will testify if called as a witness in this case that it was not practical to have attempted to keep the old brick retaining wall in place and to under-pin it to cover the excavation for the said runway and hold up the side of plaintiff's rear yard and that the new concrete retaining wall makes a much better looking and stronger job than the old wall with the under-pin-ing could possibly have done.

35 That if the old wall had been left standing it would have projected above the level of the plaintiff's rear yard about three or four feet, and would have been rough and unsightly on the face on defendant Rench's side.

That John W. Oehmann, Inspector of Buildings for the District of Columbia would testify if called as a witness in this case, that there is no permit required for the erection of the said retaining wall by the building regulations of the said District and that said plans for said improvements to the property of defendant Rench and the building permit issued in this case did not therefore show nor cover the erection of said retaining wall, in the destruction of the old wall.

That whenever a person in a building operation in the District of Columbia changes an existing grade or wall so as to affect adjoining property they are required by Section 41 of the Building Regulations to restore the adjoining property to as good condition as they were immediately prior to the operations. Said Section 41 is as follows: "Protection and Restoration of Adjoining Property." "Sec. 41. Every portion of every structure in process of construction, alteration, repair, or removal, and all neighboring property and structures, or any portion thereof affected by such process or by an excavation, shall be sufficiently supported and protected by the building owner during such process; and all necessary precautions for protection of life and limb shall be taken by said building owner and his agents, who shall within a reasonable time in the judgment of the In-

spector of Buildings, restore the adjoining property and structures removed or damaged by him or them to as good condition as they were immediately prior to his or their operations."

36 That said Oehmann and William E. Carr, a Field Inspector of the Building Inspector's Office will testify that defendants have restored plaintiff's property to as good condition as they were before the work on defendant Rench's property was commenced.

That the Building Regulations of the District of Columbia as far as applicable to this case are to be admitted in evidence as if formally proved.

FRANK SPRIGG PERRY,
Attorney for Plaintiff.
G. R. LINKINS,
Atty. for Defendants.

The Plaintiff, Mrs. Fannie S. Perry, will testify if called as a witness in this case that she was notified over the telephone by her son, F. S. Perry, on the morning of March 24, 1924 that the Defendants expected to remove the retaining wall between the rear yards of her house at 1536 16th Street and the adjoining yard of 1534 16th Street. She had had no notice prior to that time and the following morning was much surprised to learn that the Defendants had gone ahead with the destruction of the wall. The Plaintiff paid \$10.00 for the bond on the preliminary injunction and obligated herself for this amount in case the work was improperly stopped. That she had seen the wall between these rear yards in December 1923 and it was suitable for its purpose and was not in need of repair.

Plaintiff has not given her consent in writing or orally for the destruction of the old wall, nor has she given any such consent for the erection of the new wall. The corner of the wall between Plaintiff's rear yard and the alley which adjoins Defendants' premises
37 has been left in a ragged and unsightly condition and projects several inches beyond the line established by Defendants' new wall. The corner of this alley wall should be chiseled off and smoothed up in a proper manner.

FRANK SPRIGG PERRY,
Attorney for Plaintiff.
G. R. LINKINS,
Atty. for Defts.

Decree Dismissing Bills.

Filed November 13, 1924.

* * * * *

This cause coming on for hearing, upon consideration of the original and amended bills, the answer of the defendants and other proceedings and stipulation as to evidence and after argument by counsel for the respective parties, it is this 13th day of November, 1924

Adjudged, ordered and decreed, that the original and amended bills be and the same are hereby dismissed with costs to the defendants for which they shall have execution as at law.

By the Court,

A. A. HOEHLING,
Justice.

Exception noted and appeal asked in open Court.

F. S. PERRY.

Cost bond on appeal fixed at \$100 or deposit of \$50 cash.

A. A. HOEHLING,
Justice.

38

Motion for a Modification of Decree.

Filed November 18, 1924.

* * * * *

Now comes the Plaintiff through her Attorney and asks that the decree entered in the above entitled case on November 13, 1924 be modified by striking out that section dealing with costs, so as to permit each party to pay their own costs.

The Plaintiff shows that the original bill in this case, filed on March 26, 1924, was prepared and presented to this Court at a time when Plaintiff had reasonable grounds for believing that her property was in *grave danger* owing to the action of the Defendants in tearing down the wall between the rear yards *without notice* to the Plaintiff. A decree for costs at this time would be a decision by this Court that the Plaintiff when she filed her bill had no proper grounds for such action.

FRANK SPRIGG PERRY,
Attorney for Plaintiff.

George W. Linkins, Esq.,
1719 K Street N. W.,
Washington, D. C.:

Please take notice that the above Motion has been set for hearing for Friday, November 21, 1924 at 10 o'clock A. M.

FRANK SPRIGG PERRY,
Attorney for Plaintiff.

Order Overruling Motion to Modify Decree.

Filed November 28, 1924.

* * * * *

39 Upon consideration of the motion of the plaintiff to strike out the portion of the decree of November 13, 1924 allowing costs to defendants, it is this 28th November 1924, ordered that said motion is overruled.

By the Court:

A. A. HOEHLING,
Justice.

Date.	Proceedings.	Deposits.	Fees.	Total.
June	2. Order overruling motion to dismiss bill. M. 120 P. 409 filed .....	.....	.55	.....
"	7. Answer of defts., bill & Exhibits (4) filed.....	.....	1.25	.....
"	10. Motion of plff. to strike defts' answer & for decree & notice. ....	.....	.50	.....
"	20. Order overruling motion to strike out Answer. M. 120 P. 404 filed.....	.....	.40	.....
				3.95
Aug.	" Add'l Deposit for Costs by Perry	5.00	.....	.....
"	23. Cause calendared for next term of Court & Notice filed.....	.....	.50	.....
				.50
Nov.	13. Stipulation & Exhibit filed....	.....	.50	.....
"	" Decree dismissing original & amended bills with costs; appeal noted (testimony). M. 123 P. 94.....	.....	.40	.....
"	18. Petition of plff. for modification of decree filed.....	.....	.25	.....
"	28. Order overruling motion to modify decree. M. 123 P. 143 filed.....	.....	.40	.....
Dec.	18. Bond on appeal by plaintiff for \$100 filed.....	.....	.70	.....
				2.25
1925.				
Jan.	5. Assignment of Errors on Appeal by plff.....	.....	.25	.....
	& Acknowledgment filed.....	.....	.25	.....
"	" Designation of Record on Appeal by plff.....	.....	.25	.....
	& Acknowledgment filed.....	.....	.25	.....
42				
Jan.	5. Statement of Evidence (in duplicate,) Notice & Acknowledgment filed.....	.....	.75	.....
Feb.	4. Add'l Deposit for Costs by Perry	5.00	.....	.....
"	10. Stipulation filed.....	.....	.25	.....
"	11. Statement of evidence signed in duplicate .....	.....	.25	.....

43

Memorandum.

February 11, 1925.—Statement of Evidence signed.

Designation of Record.

Filed January 5, 1925.

* * * * *

Plaintiff having perfected an appeal in the above entitled cause to the Court of Appeals of the District of Columbia on December 18, 1924, hereby requests the Clerk of the Supreme Court of the District of Columbia to prepare at Plaintiff's expense a transcript of the record on appeal, including therein the following papers and proceedings, to wit:

1. Original Bill and affidavits (2).
2. Order issuing temporary restraining order.
3. Affidavits (2) in opposition to restraining order.
4. Order dissolving temporary restraining order and refusing injunction pendente lite.
5. Motion to dismiss original bill.
6. Amendment to original bill.
7. Order overruling motion to dismiss original and amended bills.
8. Joint and several answers of defendants and 4 Exhibits.
9. Motion to strike out joint and several answers.
10. Order refusing to strike out joint and several answers.
11. Statement of Evidence filed Nov. 13, 1924.
12. Decree dismissing bill.
- 44 13. Motion for modification of decree dismissing bill.
14. Order refusing modification of decree dismissing bill.
15. Assignment of Errors.
16. Statement of Evidence.
17. Docket entries.
18. Stipulation as to record on appeal.
19. Together with a copy of this Designation.

FRANK SPRIGG PERRY,
Attorney for Plaintiff Appellant.

Service of the foregoing Designation acknowledged this 5th day of January, 1925.

G. R. LINKINS,
Attorney for Defendant Appellees.

45

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 44,

both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 42384 in Equity, wherein Fannie S. Perry is Plaintiff and W. K. Reeves and Victor B. Rench are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 9th day of March, 1925.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,

Clerk.

E. W.

46 In the Supreme Court of the District of Columbia.

Equity. No. 42384.

FANNIE S. PERRY, Plaintiff,

vs.

W. K. REEVES and VICTOR B. RENCH, Defendants.

George R. Linkins, Esq.,
Attorney for Defendants:

Please take notice that the within Statement of Evidence in the above entitled cause will be called to the attention of and submitted to the Court on February 6, 1925 at 10 o'clock A. M. or as soon thereafter as counsel can be heard, for the purpose of having the same signed and sealed by the Court.

FRANK SPRIGG PERRY,
Attorney for Plaintiff.

Service of the foregoing notice and copy of said Bill of Exceptions acknowledged this 5th day of January, 1925.

Attorney for Defendants.

47-51 In the Supreme Court of the District of Columbia.

Equity. No. 42384.

FANNIE S. PERRY, Plaintiff,

vs.

W. K. REEVES and VICTOR B. RENCH, Defendants.

Statement of Evidence.

Be it remembered that at the trial of this case before the Hon. A. A. Hoehling, Justice, holding Equity Division No. 1, Plaintiff and Defendants introduced evidence to the Court in the form of an agreed Statement of Facts, as follows: Thereupon there was offered in evidence and read to the Court the agreed Statement of Evidence filed Nov. 13, 1924 marked Item 11 in the Designation for Preparation of Record, and heretofore inserted and copied.

52 That the blueprint of the plan of the defendants for the construction of the garage under the kitchen does not show a wall of any kind between the rear yards of the two premises in question. The blueprint shows an excavation of about seven (7) feet at the entrance of defendant's garage adjoining the rear of plaintiff's house and the gradual rise therefrom for about thirty-two feet six inches to the grade of the alley in the rear. The new concrete retaining wall built by the defendants is about seven feet below level of plaintiff's yard, adjoining the rear of the two houses, and slopes gradually with the runway of defendant's garage to the grade of the alley.

Other sections of the Building Regulations relative to party walls and excavations are as follows:

"Adjoining Owner.—The owner or owners of the premises adjoining those under consideration, or adjoining the property of the building owner."

"Alterations.—Any change, addition, or modification in construction."

"Building.—Anything erected by art, and fixed upon or in the soil, composed of different pieces connected together, and designed for use in the position in which so fixed. Thus, a pole fixed in the earth is not a building, but a fence or a wall or any construction within the scope or purview of these regulations is."

53 "Building Line.—A line beyond which property owners or others have no legal or vested right to extend a building, or any part thereof, without special permission and approval of the proper authorities; ordinarily a line of demarkation between public and private property, but also applied to a building restriction line when recorded on the plats of the Surveyor's Office, District of Columbia."

"Party Wall.—A wall built upon the dividing line between adjoining premises for their common use."

"A permit will be required for the erection of a fence, but will not be required for the repair or reconstruction of a fence already in place.

"A permit is required to convert any building to other use than that for which it was originally intended as expressed in the application and permit issued for its construction or repair."

"Party Walls. Sec. 62. The fourth section of the Building Regulations, No. 1, approved by President Washington, October 17, 1791, quoted below, is recognized as in force, and is published for the information of builders. The Inspector of Buildings has no official duty as to the enforcement of this regulation, as the matter is one of private rights between parties:

'That the person or persons appointed by the Commissioners to superintend buildings may enter upon the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built, and shall be of the breadth and thickness determined by such person proper, and the first builder shall be reimbursed one moiety of the charge of such party wall or so much thereof as the next builder shall have occasion to make use of before such next builder shall anyways use or break into the wall, the charge of value thereof to be set by the person or persons so appointed by the Commissioners.' "

"Party Walls in Steel or Skeleton Construction. Sec. 68. Party walls of steel or skeleton construction, concrete, and stone will not be permitted unless a written agreement relating thereto, properly signed by adjoining owners, has first been filed in the office of the Inspector of Buildings with the plans and application for the building or wall, and said agreement must constitute a waiver by said owners, their heirs, executors, administrators, and assigns, of all rights and privileges accorded to adjoining owners by the party-wall regulation approved by President Washington, October 17, 1791, and set forth in section 62 of these regulations; and said agreement shall further release, relinquish, and indemnify the District of Columbia and its employees from all claims for damages that may arise
54 from the location or construction of such party walls. Any wall shall be deemed to be a party wall if any part thereof, including footings or foundation, encroaches on the adjoining property or extends over the party line. After the written agreement or waiver above referred to has been filed in the office of the Inspector of Buildings, the party wall may be constructed according to plans approved by the Inspector of Buildings and in general conformity with these regulations as to construction only, the location being a matter of contract or agreement between adjoining owners or parties to the land affected. Unless said agreement defines the manner in which such wall shall be built to suit the common uses of the adjoining buildings, the party wall shall be constructed with sufficient strength in foundations, framework, and masonry to safely support another

adjoining building, of the same size, character, and purpose as the first building for which the building permit was issued, and in case of repairs or alterations to existing buildings said wall must be of sufficient strength to support as a party wall the combined weights of adjoining buildings."

"To Locate Party Wall, May Cut Away Frame House. Sec. 71. The builder of a brick house adjacent to a frame house has the right to cut away the latter sufficiently to place a party wall equally upon his own and adjoining lot.

Sec. 72. The builder of a brick house, when availing himself of the privileges specified in section 71, is required to make good all damages occasioned thereby to the frame house.

Sec. 73. Where an excavation is to be made adjacent to and below the foundation of a wall other than a party wall, the building owner shall give adjoining owner ten days' notice in writing before proceeding with the work."

"Party Wall—Use, Repair, Removal and Expense. Sec. 74. The Inspector of Buildings shall, upon the application of any building owner or his authorized agent, examine any party wall, and if deemed by said Inspector to be defective, out of repair, or otherwise unfit for the purpose of new buildings about to be erected, such party walls shall be made good or taken down by the building owner, as the decision may be, unless the wall is considered by the Inspector of Buildings unsafe for either the existing building or the proposed new building; then, and in that event, it shall be repaired, removed, or otherwise made safe under the provisions of section 16. But when the wall is safe and sufficient for the existing building, then the cost and expense of such repair or removal, together with the expense of the new wall or walls erected in lieu thereof, shall be borne and paid exclusively by the building owner, except in case of steel frame, stone, and concrete construction, which will depend on agreement of adjoining owners, and the building owner shall also make good

55 all damages occasioned thereby to the adjoining owner or his premises: Provided, That these regulations shall not be construed to justify the building owner in encroaching upon the premises of the adjoining owner beyond the party wall already built, or, in the case where no party wall has been built, more than nine inches without having first obtained the written consent of the adjoining owner of the premises so to be encroached upon. If in such case the building owner prefers to build an independent, new wall by the side of the old party wall, he shall be relieved from reimbursing the adjoining owner for former outlay in building the party wall. The thickness of the new wall shall be determined by the Inspector of Buildings in each and every case, but shall never be less than nine inches."

"Fences. Sec. 169. All party fences shall be erected and kept in good repair by the proprietors of the ground on each side, at their joint expense: Provided, The ground on each side shall be inclosed, used or occupied; and if any person whose duty it shall be to make or keep in good repair any fence or part of a fence shall neglect to re-

fuse to do so for five days after request being made by the other party interested, or his agent, then it shall be lawful for the party so making the request, as aforesaid, to make or repair the whole fence or part of the fence. The new fence must be a rough-board fence with tight or close joints unless otherwise agreed upon by adjoining parties, and the repairs must be made of similar materials to those of which the fence is constructed: Provided also, That no fence erected under the authority of these regulations shall be less than five nor more than seven feet in height, except by consent of the parties interested on both sides of such fence, and the permission of the Inspector of Buildings, and no front or rear fence shall be more than ten feet in height. The measurement shall be made from the surface of the ground next to the fence, and where the yards on the two sides of the fence differ in level, the measurement shall be made from the surface of the higher yard. Where lots are graded to conform to the street or alley grades abutting the property to be fenced, the measurement shall be made from the average grade on building line extending to the party fences."

The foregoing contains all of the evidence introduced by Plaintiff and Defendants at the trial of this case.

At the conclusion of the argument of counsel for the Plaintiff, the Court announced that he did not care to hear from counsel for the Defendants and without hearing from counsel for Defendants the Court dismissed the bill with costs, to which action by the Court counsel for the Plaintiff then and there excepted and which said exception was duly allowed and noted by the Court.

56 And thereupon, and as said exception was duly noted and allowed as aforesaid and duly entered upon the minutes of the Court, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered so that the Plaintiff may have her case reviewed on appeal, the Plaintiff by her attorney moves the Court to sign and seal this her Statement of Evidence and Bill of Exceptions, which motion is granted by the Court; and thereupon the Plaintiff tenders this her Statement of Evidence and Bill of Exceptions and requests the Court to sign and seal the same, which is accordingly done now, for then, this 11th day of February, 1925.

A. A. HOEHLING, [SEAL.]
Justice.

Endorsed on cover: District of Columbia Supreme Court. No. 4317. Fannie S. Perry, appellant, vs. W. K. Reeve and Victor B. Rench. Court of Appeals, District of Columbia. Filed Apr. 4, 1925. Henry W. Hodges, clerk.

ADDITION TO RECORD PER STIPULATION OF COUNSEL.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1925.

No. 4317.

FANNIE S. PERRY, APPELLANT,

vs.

W. K. REEVE AND VICTOR B. RENCH.

FILED NOVEMBER 7, 1925.

In the Court of Appeals of the District of Columbia, April Term,
1925.

No. 4317.

FANNIE S. PERRY, Appellant,

vs.

W. K. REEVE and VICTOR B. RENCH, Appellees.

Stipulation.

It is stipulated by counsel for the respective parties in the above entitled cause that the certified copy of Defendants' Exhibits, Nos. 1 and 2, and hereto annexed, shall be made a part of the record in said cause, said matter having been omitted inadvertently when the record was prepared.

FRANK SPRIGG PERRY,
Attorney for Appellant.

G. L. LINKINS,
CHAS. LINKINS,
Attorney- for Appellees.

Supreme Court of the District of Columbia.

No. 42384. Equity.

FANNIE S. PERRY, Plaintiff,

vs.

W. K. REEVE et al., Defendants.

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, do hereby certify the annexed to be true and correct copies of the original Defendants' Exhibits Nos. 1 and 2 attached to Answer of Defendants as (they) appear of record in the Clerk's Office of said Court in the above-entitled cause.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 15th day of October, 1925.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,

Clerk,

By F. E. CUNNINGHAM,

Assistant Clerk.

EW.

DEFENDANTS' EXHIBIT No. 1.

Building Division,
District of Columbia.

No. 66419.

No. Brick—M.

Permit No. 6880.

Permit to Repair.

Washington, Feb. 27, 1924.

This is to certify, That O. B. Rench has permission to erect addition at rear & make repairs as per plans new sleeping porch.

Filed Jun. 7, 1924.

MORGAN H. BEACH,

Clerk.

Building material to be deposited upon Public Space.

No. 1534-16th St. N. W.

Lot 43, square 180, in accordance with application and plans on file in this office, and subject to the building regulations of the District of Columbia, the right being reserved to enter and examine the buildings during operations conducted under authority of this permit, and

to require any change in construction that may be necessary to insure sufficient strength or safety from fire.

By order of the Commissioners, D. C.
Deposit No. —. Amount, \$—.

JOHN W. OEHMANN,
Inspector of Buildings.

28 00.

Paid C. M. Towers, Collector of Taxes, D. C., Feb. 27, 1924.
Collector of Taxes, D. C., Per ————
Countersigned: D. J. Donovan, Auditor, D. C.

DEFENDANTS' EXHIBIT No. 2.

Building Division,
District of Columbia.

No. 66682.

located less than 50 feet
back of the building
line of lot.

No. Brick—M.

Permit No. 7142.

Permit to Garage.

Washington, Mar. 6, 1924.

This is to certify, That O. B. Rench has permission to erect one
brick private garage, 18' x 18' x 10'6" as per plans—
see permit #6680/24

all their

Surveyor, D. C.,

In accordance with Section 28 of the Building Regulations, D. C.

This permit grants no authority to
store or use gasoline or any other
inflammable material, nor con-
strued as waiving

ing any

notice

in the District

umbia

Filed Jun 7, 1924.

MORGAN H. BEACH,
Clerk.

No. R—1534 16" N. W.

Lot 43, Square 180, in accordance with application and plans on
file in this office, and subject to the building regulations of the Dis-
trict of Columbia, the right being reserved to enter and examine the
buildings during operations conducted under authority of this per-

mit, and to require any change in construction that may be necessary to insure sufficient strength or safety from fire.

By Order of the Commissioners, D. C.

Deposit No. —. Amount, \$—.

JOHN W. OEHMANN,
Inspector of Buildings.

Fee, \$1.00.

Paid C. M. Towers, Collector of Taxes, Mar. 6, 1924.

Countersigned: D. J. Donovan, Auditor.

Collector of Taxes, D. C., Per ———.

Inspector of Buildings.

Endorsed: 4317. Fannie S. Perry, Appellant, vs. W. K. Reeve and Victor B. Rench. Addition to record per stipulation of Counsel. Court of Appeals, District of Columbia. Filed Nov. 7, 1925. Henry W. Hodges, Clerk.

(8225)

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

APR 24 1925

Henry H. Hodges
Clerk

Court of Appeals of the District of Columbia

APRIL TERM, 1925

No. 4317

FANNIE S. PERRY, *Appellant*

vs.

W. K. REEVE and VICTOR B. RENCH, *Appellees*

BRIEF OF APPELLANT

FRANK SPRIGG PERRY,
Attorney for Appellant.

Court of Appeals of the District of Columbia

APRIL TERM, 1925

No. 4317

FANNIE S. PERRY, *Appellant*

vs.

W. K. REEVE and VICTOR B. RENCH, *Appellees*

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The Plaintiff, Appellant, FANNIE S. PERRY, is the owner in fee simple of premises 1536 Sixteenth Street, Northwest, in this city. The Defendant, Appellee, VICTOR B. RENCH, is the owner of premises 1534 Sixteenth Street, Northwest, adjoining the premises of Plaintiff. The Defendant, Appellee, W. K. REEVE, is a Building Contractor, who was employed by the Defendant RENCH to remodel and repair premises 1534 Sixteenth Street.

In March, 1924, the Defendants made application to the Building Inspector's Office for a permit to erect a brick garage in the rear basement of premises 1534 Sixteenth Street. This permit was issued by the Building Inspec-

tor's Office on March 6, 1924, and there was attached to the permit a blueprint of the plan of Defendant's remodeling of the house (p. 13). The remodeling of this house included the extension of the back building and in the construction of the garage in the rear basement it was necessary to excavate the rear yard of Defendant's premises 1534 Sixteenth Street to a depth of about seven (7) feet below Plaintiff's yard, thence gradually rising for a distance of thirty-two (32) feet six (6) inches to the grade of the alley in the rear (p. 29).

Between the rear yards of premises 1534 and 1536 Sixteenth Street there was prior to March, 1924, a wall of brick and concrete mortar standing some three (3) or four (4) feet above the level of Plaintiff's rear yard. This wall was surmounted by a wooden division fence. The retaining wall was some eighteen (18) or twenty (20) inches thick and approximately half being located on each of the premises (p. 11, 21). This wall had been erected over twenty-five (25) years before this date by the Plaintiff with the consent of the then owner of premises 1534 Sixteenth Street at a cost of one-half to each of the then owners. (p. 2.) The brick and concrete portion of this wall served as a retaining wall for the rear yard of premises 1534 Sixteenth Street and these premises were about three (3) feet above the level of the rear yard of Plaintiff's premises.

On March 24, 1924, an agent of Defendant REEVE notified the Plaintiff, owner of premises 1536 Sixteenth Street, that in the making of the contemplated improvements to premises 1534 Sixteenth Street it would be necessary to tear down the retaining wall and move the division fence (p. 13). Defendants were advised that the agent of the Plaintiff would come out and look at the property and that the Defendants would have to write asking per-

mission for the removal of this said wall (p. 14). Immediately thereafter and without waiting for any permission from the Plaintiff and without waiting for the inspection by the agent of the Plaintiff, the Defendants proceeded with the destruction of this wall between these premises and removed the division fence.

On March 26, 1924, Plaintiff filed the bill in this suit alleging these facts and setting out that the Defendants had proceeded in the most high-handed and arbitrary manner and had not given her notice other than as stated herein (p. 3). This petition asked that a temporary restraining order be granted, without further notice to Defendants, to prevent them from tearing down and destroying the remainder of the said wall and fence. This petition was accompanied by the affidavit of Plaintiff and the affidavit of Plaintiff's attorney (p. 4, 5). The Court thereupon issued a temporary restraining order and set it for hearing on March 28, 1924, at which time there were filed the affidavits of each of the Defendants REEVE and RENCH in opposition to the temporary injunction prayed for (p. 7-9). In each of the affidavits of the Defendants it was stated that the work was being done in accordance with the plans and permit approved by the Building Inspector's office and that they would pay the cost and expense of tearing down and replacing the wall and fence without any cost or expense to the Plaintiff. Thereupon, after consideration of the pleadings and affidavits the temporary restraining order was vacated and the temporary injunction denied (p. 10). The Defendants then proceeded with the destruction of the retaining wall and excavated the rear yard of premises 1534 Sixteenth Street and built a new wall of concrete of about eighteen (18) inches in thickness on the division line of these premises and approximately half of this wall was

relocated on Plaintiff's land and half on Defendant's land (p. 21). The original wall of brick and concrete mortar was used as a wall to retain the earth on the premises 1534 Sixteenth Street, as those premises were about three (3) feet higher than the grade of Plaintiff's rear premises. The new retaining wall of concrete has been erected by the Defendants to retain the earth on Plaintiff's rear premises, as, since the excavation of Defendant's yard, it is seven (7) feet below the grade of Plaintiff's rear premises.

Neither the application to the Building Inspector's Office for the erection of the garage under Defendant's rear premises (p. 21), nor the blueprint attached thereto showed a wall of any kind between these rear yards (p. 29). The Answer of the Defendants specifically denies that they requested permission to remove this retaining wall or fence, or to erect a new and other retaining wall and fence, claiming that under the law no permission was necessary (p. 14).

The Building Regulations were offered in evidence. In Sections 68 and 74, dealing with Party Walls, it is provided that the plans and applications for the locations, construction or repair of party walls must be filed with the Office of the Building Inspector and that no party wall of concrete will be permitted unless there is a written agreement between the adjoining owners of the land affected (pp. 30, 31). The Plaintiff offered evidence that the wall as it then existed was suitable for its purpose and was not in need of repair (p. 22). The Building Regulations, Section 73, further provides that where an excavation is made below the foundation of a wall other than a party wall, ten (10) days' written notice must be given to the adjoining property owner before proceeding with the destruction of the wall. (p. 31).

The case was heard in open Court and on November 13,

1924, the bill of the Plaintiff was dismissed with costs after counsel for the Plaintiff had concluded his argument, the Court announcing that he did not care to hear from counsel for the Defendants (p. 22, 23).

ASSIGNMENT OF ERRORS

The Plaintiff, Appellant, alleges as her Assignment of Errors that the Lower Court erred:

- 1—In decreeing the dismissal of Plaintiff's Bill.
- 2—In not decreeing to Plaintiff a permanent injunction prohibiting the Defendants from maintaining a wall on the land of Plaintiff.
- 3—In awarding costs in favor of the Defendants.

ARGUMENT

The Plaintiff Appellant, Mrs. FANNIE S. PERRY, was notified on March 24, 1925 by telephone by the Defendant Appellees that they were going to tear down the brick and concrete wall on the rear of the premises owned by her at 1536 Sixteenth Street, N.W., in the original city limits. The wall was on the division line between her premises and that of her neighbor, 1534 Sixteenth Street, N.W. It was about 18 inches wide and was located about one-half on each premises. It had been built by Plaintiff and one-half at her expense for over 25 years and was not in need of repair. (p. 22.)

Mrs. Perry requested that the notification be put in writing and if no damages were likely to occur that permission might be granted. (p. 2.)

The Defendants did not await any action on Plaintiff's part, but immediately proceeded to tear down the wall. They were halted in their destruction of the wall by the temporary restraining order of March 26. After the temporary restraining order was dissolved on March 28,

the Defendants proceeded with the destruction of the old wall and erected in the same place a new wall *of concrete* of about 18 inches thick, *half of which* is on Plaintiff's property. (p. 15.) Neither the erection of the new wall, nor its location, nor its materials were approved by the Plaintiff.

In the Joint and Several Answer of the Defendants, justification for this tearing down of the old wall and the erection of the new wall was alleged in the "permission" of the Building Inspector. The Defendants in their answer specifically denied that they requested "permission" from the owner

"as under the law no permission was necessary except that of the Building Inspector of the District of Columbia whose permission defendants had as aforesaid." (p. 14.)

It is further alleged in the answer that "it was necessary" in the building of the garage to tear down the old wall and erect a new one. (p. 13.) Much stress in the answer is laid upon the several permits issued by the Building Inspector for the remodeling of premises 1534 Sixteenth Street, N.W., and the building of the garage.

When the case was reached for trial, a "Stipulation as to the Evidence" was agreed to by both parties and admitted as the evidence of the case. (p. 19.) As part of this evidence there were introduced two permits (p.) dealing with the remodeling of premises 1534 Sixteenth Street, N.W. Neither of these permits showed any permission by the Building Inspector to tear down or replace or repair the division wall between the rear premises.

The blueprint which was attached to the permit in the Building Inspector's Office, a copy of which was introduced in evidence, did not show any wall between the

rear of these premises and offered no indication that such wall was to be torn down or replaced or repaired. (p. 29.)

The Defendants further offered the testimony of the Building Inspector that no permit was required for the erection of this wall by the building regulations and that the building permit did not show or cover the erection of said retaining wall. (p. 21.) In other words, the Building Regulations do not deal with a wall of this character. Justification then must depend solely upon the agreement of the parties.

The Defendants do not claim that this was a *party wall*, as then it would be necessary for them to show a permit from the Building Inspector's Office. (Regs. 68 and 73, pp. 30, 31.) Furthermore, it is expressly forbidden that such a party wall be constructed out of *concrete* without the permission in writing of the adjoining owner.

This wall not being considered a party wall by the Defendants they are confronted with the provisions of Section 73 of the Building Regulations that where an excavation is to be made adjacent to and below the foundation of a wall other than a party wall, ten days' notice in writing must be given to the adjoining owner (p. 31.) No attempt was made to comply with this regulation.

There remains but one theory, so far as counsel for Appellant conceives, for any attempt at justification of this high-handed and unwarranted trespass. The wall was a party wall in that it rested jointly upon the lands of two proprietors. Will such a position give one proprietor the right to destroy such wall and erect another in its place over the protest of the adjoining owner?

The nature and incidents of a party or division wall have been established for many years in this jurisdiction. In the absence of an agreement, Building Regulations

may authorize them in certain specific cases, and custom aided by an estoppel may sanction their use, but here no attempt is made to justify under the Building Regulations or any custom.

The case of FOWLER vs. KOEHLER, 43 APP. D. C. 350, is controlling:

(p. 355.) "The building regulations of the District of Columbia in respect of party walls rise neither to the dignity of statutes or ordinances. They are mere rules for the enforcement of existing rights, established, in this instance, by the order of President Washington, expressly authorized by the provisions of the original grant. The order of the President was necessary, in conjunction with the terms of the grant, to establish this perpetual easement or servitude upon all of the lands embraced within the original city. Being contractual, no legislation was necessary either for the enforcement or the enlargement of the right. Neither Congress nor the commissioners of the District have ever attempted to extend the original party wall regulation promulgated by President Washington. Duties have been imposed from time to time upon the surveyor and inspector of buildings in regard to supervising the construction of party walls; but these can only be interpreted as applying to legal party walls, or such as existed within the original city or by convention of the parties. Indeed, the last building regulations adopted by the commissioners of the District (October 18, 1909) contain the following provision: 'Sec. 62. The 4th section of the building regulations, No. 1, approved by President Washington, October 17, 1791, quoted below, is recognized as in force and is published for the information of builders. The inspector of buildings has no official duty as to the enforcement of this regulation, as the matter is one of private rights between parties.' Referring to the regulation of President Washington, Mr. Justice Cox, in FOWLER v. SAKS, 7 Mackey, 570, 579, 7 L.R.A. 649, said:

'This building regulation, so authorized, is the foundation and the only source of the right claimed by any one here to locate his party wall one-half on his neighbor's land.'

"There are but two lawful ways in which a party wall can be established—(1) by contract between the owners of the adjoining properties, and (2) by force of statute. The limitation is well expressed by Justice Cox in *FOWLER vs. SAKS*, *supra*, as follows: 'What we understand now by a party wall had no existence at common law, except by convention between coterminus proprietors. A man had no right to enter upon and occupy a part of his neighbor's land for his own convenience, or for any purpose whatever, without his consent. The privilege or easement, as we call it, giving to a builder the right of erecting a division wall between himself and his neighbor, partly upon his neighbor's land, is therefore purely the creature of legislation.'"

* * * *

(p. 357.) "We now come to the more difficult questions involved in the present case. The erection of a party wall by one of the two adjoining owners does not, we think, amount to a taking of private property for private use, in the broad sense of the limitations of the Constitution. It amounts only to the establishment of a mutual easement or servitude and benefit. Of course, in the absence of statutory or contractual authority, such a servitude may not be imposed. But, as we shall observe later, it may, under certain conditions, be maintained, though constructed without either statutory or express contractual authority. The erection of a party wall does not change the boundaries nor affect the title of the respective properties. While it stands, each party is permitted to use the wall. The right to its use and enjoyment passes with a conveyance of the properties, and when, for any reason, it ceases to exist, the rights of the respective owners stand as originally.

"At common law it was defined as a wall of

which two adjoining owners are tenants in common. *WATSON v. GRAY*, L. R. 14 Ch. Div. 192, 49 L. J. Ch. N. S. 243, 42 L. T. N. S. 294, 28 Week. Rep. 438, 44 J. P. 537; *CUBITT v. PORTER*, 8 Barn. & C. 257, 2 Mann. & R. 267, 6 L. J. K. B. 306. In this country, many of the States have adopted the rule that the owners of a party wall erected in part upon the land of each are not tenants in common of the wall, but are owners in severalty of the part standing upon his land, subject to the easement of his neighbor for its support and the equal use thereof. In other words, the owners of the adjoining lands upon which the wall is constructed are neither joint tenants nor tenants in common of the wall, but each owns the soil in severalty up to the dividing line, as well as that portion of the wall resting upon it, and the soil of each, with the portion of the wall belonging to him, is burdened with the easement and servitude of support in favor of the other. *HOFFMAN v. KUHN*, 57 Miss. 746, 34 Am. Rep. 491; *FIDELITY LODGE, NO. 59 I. O. O. F. v. BOND*, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825; *EVERETT v. EDWARDS*, 149 Mass. 588, 5 L. R. A. 110, 14 Am. St. Rep. 462, 22 N. E. 52; *BELLENOT v. LAUBE*, 104 Va. 842, 52 S. E. 698."

* * * * *

(p. 362.) " * * * The mere exercise of the legal right to place one half of the wall on the adjoining land created no title in it. It created in the builder of the wall a right to compensation for one half of its cost when the owner of the adjoining lot should elect to use it. The right to compensation is a mere personal claim, which the law establishes against the adjoining owner when he elects to use the wall; but it creates no interest either in the property or the wall adverse to such owner."

In the case of *SMOOT v. HEYL*, 34 APP. D. C. 480, which was affirmed by the United States Supreme

Court, 227 U. S. 518, this Court said of an attempt to occupy a part of a neighbor's land by a division wall:

"The servitude thus imposed is one created by statute, and, as it contemplates the taking and permanent occupation of a portion of the land of a servient owner, it must be strictly construed." (p. 482.)

In the consideration of the erection of a division or party wall, it is necessary that the wall be for the *mutual benefit* of the adjoining owners. MANN v. BOYTS, 47 APP. D. C. 363; SMOOT v. HEYL, 34 APP. D. C. 480; CORCORAN v. NAILOR, 6 MACKEY 580.

The present wall is lacking in this essential element of mutuality necessary to create a mutual servitude. The old brick and concrete mortar wall which had stood for over 25 years was originally erected by agreement. The dominant owner in this case, MRS. PERRY, erected this division and retaining wall of brick and concrete mortar with the consent of the servient owner. The assignee of the servient owner, instead of making use of the wall in place, takes advantage of the easement to tear down the old wall and erect a new wall solely for his own benefit. Thus the assignee reverses the operation and becomes in turn the dominant owner and MRS. PERRY the servient owner, entirely without her consent and against her wish.

It is manifestly no advantage to MRS. PERRY to have a wall on her land to prevent earth from falling into the garage of the Defendant. MRS. PERRY, a property owner, is entitled to have the earth on her property protected from subsidence when an excavation is made on the adjoining property by a support not on her own land. MRS. PERRY is entitled to the right of lateral support of her land. This is a natural right and

can only be overcome by clear evidence of a surrender. TIFFANY REAL PROPERTY, Sec. 301, 309 (pp. 668, 690).

The concrete retaining wall as now constructed is of no service to MRS. PERRY. It extends from the level of the ground at its deepest point seven feet below such surface. It is and only purports to be a retaining wall for the earth and no proof is offered that it is suitable for the foundation of a building or structure. MRS. PERRY can make no use of this wall. It is not a benefit, but a detriment to her property to have an excavation immediately adjoining her property. She should not be required to give up the possession and ownership of this strip of her land to enable her neighbor to perform his duty towards her and protect his own building.

Where a dominant owner seeks to invade the property of an adjoining owner, and against the objection of such adjoining owner, the court will require the dominant owner to proceed strictly in accordance with law. If any legal objection has been overlooked the invaded owner may take advantage of it. This doctrine is set out and applied in the case of KOSACK v. JOHNSON, 38 APP. D. C. 62, 68, where a strip of land 22/100 of a foot in width belonging to a third person was of sufficient moment to prevent the erection of a party wall. In the present case no attempt was made to comply with the law.

There remains a question of procedure raised by Defendants' Answers that Plaintiff has an adequate remedy at law. (p. 16.) It is sufficient to say that this point was raised and decided adversely to Defendants in the case of MANN vs. BOYTS, 47 APP. D. C. 363. The Defendants went upon Plaintiff's land and erected this retaining wall in violation of her rights and against her protest. The Plaintiff cannot be forced to sell her

property to the Defendants, but equity will compel them to restore the premises as nearly as may be to their original condition and to make good any damage.

The Appellant, MRS. FANNIE S. PERRY, requests that the decree of the lower Court be reversed and relief granted as prayed for in the bill.

Respectfully submitted,

FRANK SPRIGG PERRY,
Attorney for Appellant.

**In the Court of Appeals
of the State of New York**

No. 2317

JAMES S. CARRY, APPELLANT

vs.

**W. K. REEVE AND VICTOR S. KENCH
APPELLEES**

BRIEF OF APPELLEES

**GEORGE R. LINTIN
COUNSEL FOR APPELLEES**

NEW YORK, N. Y.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1925.

No. 4317.

FANNIE S. PERRY, APPELLANT,

vs.

W. K. REEVE AND VICTOR B. RENCH,
APPELLEES.

BRIEF OF APPELLEES.

Statement of the Case.

This case is fully stated in the bill of complaint (Rec., pp. 1-4), amendment to bill (Rec., p. 11), and the joint and several answer of the defendants (Rec., pp. 12, 13, 14, 15 and 16), and the stipulation as to the evidence (Rec., pp. 19, 20, 21 and 22).

ARGUMENT.

For the purposes of this argument the appellant will be designated the plaintiff, and the appellees, the defendants, these being their positions in the court below.

The defendant Rench had used a part of the plaintiff's party wall in the construction of a rear addition to his premises; had paid the plaintiff therefor, and with this part of the construction work this case is not involved.

The whole question concerns the removal of a long existing retaining wall between plaintiff's and defendant Rench's property, and the building of a new and deeper

retaining wall and a division fence surmounting it, to protect plaintiff's property in the construction of the basement garage, permit for which was granted by the building inspector.

Plaintiff's sole complaint is that this old retaining wall (which had existed for 25 years), between the yards was torn down without her consent and a new wall erected, with division fence surmounting it; the new wall occupying the same ground as the old ones. It is admitted that defendant Rench paid the entire expense of the new wall and that defendant Reeve, Contractor, would have testified, as set forth in the stipulation, that the old retaining wall could not be under-pinned and that the tearing away of the old retaining wall and the building of a new retaining wall made a much better job.

Plaintiff is in error in contending that the new retaining wall is a party wall under Building Regulation No. 1, approved by President Washington, October 17, 1791. On the other hand it is admitted in the stipulation of evidence (Rec., p. 21) that John W. Oehmann, Inspector of Buildings for the District of Columbia would have testified, as follows:

"That there is no permit required for the erection of said retaining wall by the building regulations of the said District and that the said plans for said improvements to the property of defendant Rench and the building permit issued in this case did not, therefore, show nor cover the erection of said retaining wall or the destruction of the old wall."

It is also admitted in the stipulation of evidence (Rec., p. 21) that said Building Inspector would have testified that Section 41 of the Building Regulations is the only regulation applicable to this case, which testimony is, as follows:

"Every portion of every structure in process of construction, alteration, repair, or removal, and all neighboring property and structures, or any portion thereof affected by such process or by an excavation, shall be sufficiently supported and protected by the building owner during such process; and all necessary precautions for protection of life and limb shall be taken by said building owner and his agents, who shall within a reasonable time in the judgment of the Inspector of Buildings, restore the adjoining property and structures removed or damaged by him or them to as good condition as they were immediately prior to his or their operations."

It is further admitted that said Building Inspector and William E. Carr, a field inspector of the Building Inspector's Office, would have further testified, as follows:

"That the defendants have restored plaintiff's property to as good condition as they were before work on defendant Rensch's property was commenced" (Rec., p. 22).

That said retaining wall is not a party wall is admitted by the plaintiff in her brief (Rec., p. 12), where it is said:

"It is and only purports to be a retaining wall for the earth and no proof is offered that it is suitable for the foundation of a building or structure."

Therefore, it is submitted that the case made out by the plaintiff is simply one where she complains that the reconstruction of this retaining wall, which had existed for 25 years, done at the expense of the defendant Rensch, was done without her permission and consent, and it is submitted that she has not and can not show any right for the requirement of such notice or consent on her part.

The court is here further confronted with the fact that the plaintiff proves no damage, and the testimony

(Rec., pp. 19, 20, 21, and 22) conclusively proves that she was in nowise damaged.

It is elemental that the rights to seek relief by injunction must be based upon irreparable injury, and it would serve no good purpose to cite cases in support of the instant case where not only irreparable injury was lacking, but the proof as to any kind of substantial damage was also entirely lacking. The court below undoubtedly adopted this view in dissolving the temporary restraining order granted upon an ex parte application, the refusal to grant a temporary injunction, and finally dismissing the bill of complaint and amended bill of complaint, after argument by counsel for the plaintiff and without hearing argument on behalf of the defendants.

The plaintiff states that this retaining wall was built about 25 years ago, by consent of herself and the then owner of the property now owned by defendant Rench one-half of it being built upon the land of each of the adjoining owners. This agreement must have been an oral one, for no writing or deed is offered in evidence in proof thereof. Such being the case, the defendant Rench has adverse rights to the land which the wall occupied and it ill becomes the plaintiff who protected her back yard 25 years ago, by agreement and at one-half the cost of the adjoining owner, when it was lower than the adjoining yard, from complaining about a wall built by defendant Rench, at his own cost and expense, occupying the same space, when by reason of his improvements, the grade of the run-way to his garage is lower than the back yard of the plaintiff's property.

It is therefore, submitted that the decree below should be affirmed with costs to the defendants.

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Attorneys for Appellees.

